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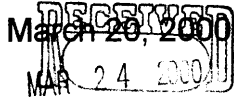
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DEPT OF TRANSPORTATION

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U.S. Department of Transportation Docket Facility
Docket No. OST 99-6578
400 Seventh St., S.W.
Washington, D.C. 20590

Dear Sir/Madam

RE: 49 CFR Part 40 [Docket OST-99-6578] - 44
RIN 2105-AC49

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

Many U.S. Department of Transportation regulated employers have embraced the concept of providing a drug free workplace by extending the controlled substances testing requirement to all employees. In these cases, the employers have developed controlled substances and alcohol policies according to federal and state requirements. However, by extending their programs, it becomes difficult to manage the program due to state or local requirements. It is their belief that the result of a controlled substance test is more important than worrying about the use of the proper custody and control forms. When will this program be extended to all other commercial vehicle drivers?

Subpart C Urine Collection Personnel

§40.33 Presently, the collector depends on instructions from the employer who sometimes is not aware of requirement differences. In this case, the collector is just a service provider. The collector now only holds the responsibility of collecting the urine specimen correctly.

Unlike the requirements for alcohol testing where the instructor is required to be certified by the manufacture, the certification requirements for controlled substances instructor and collectors are very loose. Collectors as well as instructors with many service providers change rapidly. The new rules indicate that the collector becomes the "expert" and may have to question employers regarding the type of test being requested.

With the new proposed rules, will the collector then become responsible to notify the designated employer representative regarding incorrect controlled

substances test? What protection does the collector have if the wrong controlled substances and alcohol breath testing forms are used?

According to some laboratories, they presently will not conduct a **SAMSHA** test when requested on a non-Federal custody and control form. How is it then possible to use the **SAMSHA** test on a non-Federal custody and control form?

Subpart D Collection Sites, Forms, Equipment and Supplies Used in DOT Urine Collections

§40.41 Many employers have started to implement on-site specimen collections. The collector will use one of the employee restrooms which usually have multi-stalls, a full-length privacy door. **§40.41 (f)(3)** limits the use of this type of restroom to monitored collections which means that a same gender collector must be in attendance. This will definitely increase specimen collection costs to the employer.

Will the following situations be eligible for a collection site?

1. Single toilet in a closed room with full-length door, source of water for washing hands is external to the closed room with counter for completion of custody and control forms, but others waiting for controlled substances test in this same area. Completion of custody and control forms and specimen sealing are open to view.
2. Multi-stall restroom with source of water for washing, and counter for completion of custody and control forms and specimen sealing in same area and full-length door. Collector secures water source and closes all toilets and waits until the donor surrenders the specimen.

§40.45(b)(2) To require that the employer's name address and telephone be either preprinted, typed or handwritten places an additional burden on the collector or collection facility. It means that the collection site will need to carry additional forms or more time will be required for the collector to complete this section.

§40.45(b)(5) Collectors should be allowed to **pre-sign** custody and control forms once the donor identification has been verified. The collector if appropriately trained should be able to safeguard a completed form and meet the specimen collection requirements.

§40.47 Many employers feel that getting a controlled substances test done and results reported is more important than struggling over the use of the right form. Many unions require employers to use the **SAMSHA** controlled substances test for any testing program that their members are subject to. According to some labs they are unable to use the **SAMSHA** controlled substances test on a non-DOT custody and control form and therefore have a DOT look-alike panel. This is confusing to most employers as well as collectors.

In cases of post-accident situations, there are some states that have no-fault insurance and a moving citation is not issued. Therefore, by state laws, a post-accident controlled substances test is never or rarely required.

Subpart E Drug Test Collections

§40.61(b) If the donor says he or she is not ready or unable to urinate, can the collector immediately start using procedures in Subpart I §40.193(b)(2) and make note in remarks section.

§40.61(e) This step will incur more collector's time and might therefore increase the cost of collection to the employer.

§40.61(f)(5) Is the collector allowed to feel the inside of the boots to ensure that nothing is taped to the top inside of the boot?

Subpart F Drug Testing Laboratories

§40.93 Split specimens that have been tested and confirmed by the laboratory as substituted or adulterated should not require further testing since the Department is confident that this option is legally defensible. The requirement of a split test procedure will definitely increase the cost to employers.

§40.109(e) Specimen known to be under legal challenge should be retained until all legal avenues have been exhausted and agreement has been reached by both parties. The employer should then submit in writing authorization for discard of specimen under legal challenge and this notice should be retained by the laboratory and employer for an indefinite period.

§40.111 Additional information regarding type of test and how many tests were either dilute, substituted, adulterated, cancelled or not performed would be helpful in developing controlled substances policies and enforcement.

Subpart G Medical Review Officers

§40.127 Alternative 2 seems to be more effective regarding the option for an employer to establish a stand-down policy. The stand-down policy will allow the employer to temporarily remove the employee from his safety-sensitive duties until a final determination is made and thereby limiting injuries or accidents that may occur.

§40.145 Must the MRO adhere to the 72 hour notification by the employee. If this time period is ignored, what are the consequences?

§40.153 Can the **MRO** contact the employee and inform the employee that the specimen is adulterated or substituted and will be reported to the **DER**.

§40.159 Alternative 2 is a much better way of preventing injuries or accidents that may be caused by an employee who may be under the influence of a controlled substance. In many instances, the licensed practitioner may be prescribing codeine which could affect the employee's performance and the employee usually does not read the medication's indications.

Subpart H - Split Specimen Tests and Retests

It is difficult for the collector to determine if a split specimen collection is required as most employers when arranging for the test do not specify if a split specimen is needed or what agency the employee or application is regulated by. By requiring split specimen collections for all DOT agencies, this eliminates questions by collectors and additional time that may be spent in determining what kind of collection is required. It will simply procedures for all service agents.

§40.183(d)(4) A retest under direct observation when a split specimen is unavailable for testing should be implemented. By doing this, the goals of a drug free workplace program will be strengthened.

Subpart I - Problems in Drug Tests

§40.191(a)(1) Failure to show up for any test within a reasonable time should be a reason for declaring a refusal to test. By having a limited time, it reduces the possibility of having a dilute, substituted or adulterated specimens.

§40.191(e) In some cases, the employer has made their program for post-accident testing more stringent than required by DOT regulations because of no-fault insurance in their state or local government. A refusal to take a non-DOT test should have at least the same consequences for a positive, dilute, substituted or adulterated test. Otherwise, you will weaken the employer's controlled substance and alcohol program.

Subpart O - Return-to-duty Process and Role of Substance Abuse Professionals.

In many cases, since the employer provides a list of **SAPs** to the employee, the employee selects the **SAP**. If the employee has a second positive test result for either controlled substances or alcohol or both, there is no regulation that the employee must return to the same **SAP** for the second evaluation. In many of our client's experience, most **SAPs** do not request controlled substance or alcohol or both test results. Employers have also found that many treatment programs do not test while the employee is under their control.

March 20, 2000

According to statistics, most individuals under the influence of controlled substances or alcohol, usually have a difficult time in getting away from their problem. Does it not make sense then that the employee should be required to have a follow up evaluation at 6 months or a year at the expense of the employee to determine if the assessment is successful.

§40.307 Employers have sometimes experienced very high frequency of follow up tests requirements such as 15 test in the first month after return to duty and then no follow up tests. This type of requirement places a burden of testing costs on the employer.

Regarding Applicants who test positive or refuse to take a pre-employment drug test - Recommendation to prohibit those individuals becomes unenforceable because of the following:

Who does the prospective employer notify of the positive test result or the refusal to test?

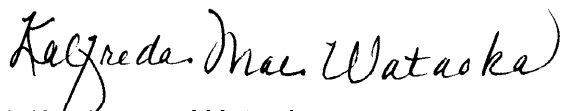
Who will monitor the individual before he or she seeks employment elsewhere?

Subpart P - Confidentiality and Release of Information

§40.321 Can the MRO release a copy of the drug test result directly to the employee without consent from the employer?

We hope that the above comments will be considered in rendering the final decision. It makes sense to make some things easier and more efficient as time is money, but not at the cost of accuracy.

Sincerely,

A handwritten signature in black ink that reads "Kalfreda Mae Wataoka". The signature is written in a cursive, flowing style.

Kalfreda Mae Wataoka
President